

Litigation

1. STATE DISTRICT COURT CASES

BROAD REACH POWER, LLC & NORTHWESTERN ENERGY V. MONT. PUB. SERV. COMM'N.
MONT. 1ST JUD. DIST. CT., CAUSE NO. CDV-202-27

- January 9, 2020 – Petition for Declaratory Judgment filed jointly by Broad Reach and Northwestern.
 - Seeks a declaration from the court that the Commission's practices of questioning witnesses, engaging in investigation, and admission of evidence in contested cases is unlawful.
- April 1, 2020 – Commission filed its response to the Petition denying all of the petitioners' contentions.
- October 13, 2020 – December 30, 2020 – Parties filed motions and supporting briefs for summary judgment.
- March 23, 2021 – Oral Argument on Summary Judgment Motions held before Hon. Judge Seeley.
- **Matter is ripe for decision. Currently awaiting decision on summary judgment from the Court.**

APEX SOLAR LLC V. MONT. PUB. SERV. COMM'N AND NORTHWESTERN ENERGY
MONT. 1ST JUD. DIST. CT., CAUSE NO. ADV-2020-1927

- This matter challenged the Commission's final order in a qualifying facility's petition to set terms of a power purchase agreement under PURPA.
- **This case was dismissed by the Court following a joint motion to dismiss from NorthWestern and the qualifying facility.**

HYDRODYNAMICS, INC. V. MONT. DEPT. OF PUB. SERV. REG. & NORTHWESTERN ENERGY
(2019 QF-1)

MONT. 1ST JUD. DIST. CT., CAUSE NO. CDV-2021-601

- This matter challenged the Commission's final order setting the terms of NorthWestern's QF-1 tariff, which applies to small qualifying facilities under PURPA.
- **This matter was voluntarily dismissed by the Petitioner.**

350 MONTANA, ET AL. V. MONT. PUB. SERV. COMM'N, ET AL.

MONT. 4TH JUD. DIST. CT., CAUSE NO. DV-32-2021-0000684-IJ

- **The Attorney General's office is representing the Commission in this matter. All substantive legal work is being performed by the Department of Justice, in consultation with the Commission's legal and regulatory staff.**
- May 28, 2021 – Complaint filed by Plaintiffs.
 - The State of Montana, the Commission, and NorthWestern Energy are named as Defendants.
 - Asks the Court to find that Mont. Code Ann. § 69-8-421 is unconstitutional.
 - §69-8-421 allows a qualifying utility to ask the Commission for "pre-approval" of the acquisition of a generating asset.
- Plaintiffs have requested several rounds of discovery from the Commission. The Commission has worked with the Department of Justice to respond to those requests.
- A Motion to Dismiss was filed by NorthWestern simultaneous with responsive pleading deadline.
 - Commission filed a response brief in support of NorthWestern's Motion on July 30.
- **The Court denied the Motion to Dismiss and issued a scheduling order.**
- **Motions for Summary Judgment are due November 17, 2021. Briefing on summary judgment would be finished in December, and it is possible the Court to rule on summary judgment before the Commission's hearing in the preapproval docket (2021.02.022) begins on January 10, 2021.**

RIKKI HELD, ET AL., V. STATE OF MONTANA, ET AL.

MONT. 1ST JUD. DIST. CT., CAUSE NO. CDV-2020-307

- **The Attorney General's office is representing the Commission in this matter. All substantive legal work is being performed by the Department of Justice, in consultation with the Commission's legal and regulatory staff.**
- March 18, 2021 – Complaint filed by Plaintiffs.
 - Names the State of Montana, Governor Steve Bullock, DEQ, DNRC, DOT, and the Commission, as Defendants.
 - Asks for broad declaratory relief that MCA 90-4-1001(c)-(g), and MCA 75-1-201(2)(a) are unconstitutional.
 - Ask for injunctive and equitable relief:
 - Permanent injunction regarding both the State's Energy Policy and the Climate Change Exception.
 - Order defendants to prepare an accounting of Montana's green house gas emissions.
 - Order defendants to develop a remedial plan to reduce emissions.
 - Appoint a special master if necessary.
- Defendants moved to dismiss on several grounds, including standing, prudential limitations, and failure to exhaust administrative remedies.
- August 4, 2021 - Court issued its Order on Motion to Dismiss. That order dismissed several injunctive and equitable requests for relief, but found that the plaintiffs had standing.

- **September 17, 2021 – State filed its Answer. We expect the Court will set a scheduling conference and issue a scheduling order in due course.**

2. MONTANA SUPREME COURT CASES

MONTANA ENVIRONMENTAL INFORMATION CENTER v. MONT. PUB. SERV. COMM’N, ET AL.

MONTANA SUPREME COURT CASE NO. DA 19-0565

- September 24, 2018 – Commission issued its Final Order granting NorthWestern Energy waivers of its obligation to satisfy Community Renewable Energy Project (“CREP”) standards (Mont. Code Ann. § 69-3-2004) for compliance years 2015 and 2016.
- November 16, 2018 – Montana Environmental Information Center filed a Petition for Judicial Review with the Montana Eighth Judicial District Court, Cascade County, asking the Court to declare the Commission’s decision to grant NorthWestern’s CREP waivers to be arbitrary, capricious and/or contrary to law.
- August 1, 2019 – Hon. Dist. Ct. Judge Manley issued an Order reversing the Commission’s Final Order granting NorthWestern’s CREP waivers.
- September 30, 2019 – NorthWestern and the Commission appealed the decision of the District Court to the Montana Supreme Court.
- April 27, 2020 – Briefing by the parties concluded.
- **2021 legislation (HB 476) repealed the Renewable Portfolio Standard (which includes CREP), so this case is likely the last instance in which this subject matter will be addressed by the Commission.**
- **September 7, 2021 – The Supreme Court dismissed the appeal (without prejudice) and sent the case back to the District Court to analyze how HB 476 affects the case.**

CED WHEATLAND WIND, LLC ET AL. v. MONT. PUB. SERV. COMM’N ET AL.

MONTANA SUPREME COURT CASE NO. DA 21-0250

- March 23, 2020 – July 13, 2020 – Commission issued a series of Final Orders and Reconsideration Orders in response to the Petitions of three separate Qualifying Facilities to set avoided cost rates under PURPA.
- August 11 & 18, 2020 – Petitions for Judicial Review filed by all three Qualifying Facilities asking the First Judicial District Court, Lewis & Clark County, to declare the Commission’s Final Orders and Reconsideration Orders in the underlying contested cases to be arbitrary, capricious, and/or contrary to law.
- October 5, 2020 – All three matters consolidated into one case.
- March 12, 2021 – Oral argument held by the Court.
- April 19, 2021 – District Court issued a decision affirming the Commission’s Orders on all issues other than two conceded by the Commission (carbon and legally enforceable obligation).
- May 24, 2021 – Appeal filed by QF-Petitioners with Montana Supreme Court.
- **August 2, 2021 – Appellants filed their opening brief.**

- **October 1, 2021 – Commission’s answer brief is due.**

NORTH STAR DEVELOPMENT, LLC V. MONT. PUB. SERV. COMM’N, et al.

MONTANA SUPREME COURT CASE NO. DA-21-0224

- September 8, 2020 – Commission issued its final order on North Star’s application to set rates for its small water/sewer utility.
- October 2, 2020 – North Star filed a Petition for Judicial Review in First Judicial District Court, Lewis & Clark County, challenging the Commission’s determination of North Star’s water/sewer rates.
- March 15, 2021 – District Court dismissed North Star’s Petition for failure to exhaust administrative remedies.
- May 12, 2021 – North Star appealed the dismissal to Montana Supreme Court.
- **August 19, 2021 –North Star filed its opening brief.**
- **October 18, 2021 – Commission’s answer brief due.**

IN RE BIG FOOT’S APPLICATION FOR CLASS D LICENSE

MONTANA SUPREME COURT CASE NO. DA-21-0249

- January 8, 2018 – Big Foot Dumpsters & Containers, LLC applied for a Class D certificate of public convenience and necessity (PCN) to haul garbage in Flathead County.
- February 12, 2018 – Allied Waste Services of North America, LLC, d/b/a Republic Services of Montana and Montana Waste Systems, Inc., d/b/a North Valley Refuse protested Big Foot’s Application.
- April 9, 2018 – Protestants filed a Petition with the First Judicial District Court, Lewis & Clark County, asking the District Court to stay the Commission proceedings, and for a decision prohibiting the Commission from making inquiry of the parties’ witnesses or admitting evidence in the Commission proceeding.
- July 9, 2018 – District Court ordered that the Commission was prohibited from issuing discovery requests to parties and ordered that the Commission must appoint a hearing examiner to conduct the contested case proceeding.
- December 3, 2018 – Commission appealed District Court decision to the Montana Supreme Court.
- August 20, 2019 – Montana Supreme Court remanded back to the Commission and affirmed District Court decision prohibiting Commission discovery.
- October 29, 2019 – On remand, the Commission issued a new procedural order addressing the investigative powers of the Commission. On November 8, 2019, Protestants sought reconsideration of the procedural order.
- December 23, 2019 – Commission denied the protestant’s request for reconsideration.
- December 30, 2019 – Protestants petitioned the First Judicial District Court, Lewis & Clark County, for immediate review of the procedural order, and injunctive relief.
- January 8, 2020, Big Foot provided the District Court with notice that it had withdrawn its PCN application before the Commission.

- January 9, 2020 – NorthWestern Energy sought—and was thereafter granted—permission to intervene in the District Court proceeding for the purpose of challenging the Commission’s discovery and investigative powers.
- April 20, 2021 – District Court issued an order dissolving a previously issued temporary restraining order allowing Big Foot to withdraw its underlying PCN application before the Commission and dismissed the matter as moot.
- May 24, 2021 – Protestants and NorthWestern appealed the dismissal to the Montana Supreme Court.
- June 22, 2021 – Commission granted Big Foot’s request to withdrawal its application.
- July 1, 2021 – Commission filed a Motion to Dismiss the appeal, contending the matter is moot as a result of the voluntary withdrawal of Big Foot’s PCN application, and acceptance thereof by the Commission.
 - Motion to Dismiss denied by MSC on July 27, 2021.
- **October 7, 2021 – Opening Briefs due from NorthWestern/Evergreen.**

3. FEDERAL LITIGATION

BEAVER CREEK WIND I, LLC et al.

FERC DOCKET NO. EL21-86-000

- June 24, 2021 – Beaver Creek Wind I, LLC, Beaver Creek Wind IV, LLC, Broadview Solar LLC, Meadowlark Solar LLC, and Greenfields Irrigation District asked FERC to issue a Declaratory Order that the Commission’s practice of allocating liability for incremental network upgrades to qualifying facilities in applications by QFs to the Commission to set rates under PURPA is unlawful.
 - The Commission has retained Wilkinson Barker Knauer, LLP as outside counsel to represent the Commission before FERC.
 - The Commission retained WBK in 2018 for the purpose of defending a similar enforcement action which commenced at FERC and then was carried over to the Montana US District Court, and appealed to the Ninth Circuit.
 - The Commission prevailed in that proceeding.
- July 8, 2021 – Commission filed notice of intervention.
- July 22, 2021 – Commission (and other intervenors) filed responses to the Petition.
- **August 23, 2021 – FERC declined to initiate enforcement action against the Commission.**

RULEMAKING PROCEEDINGS

DOCKETED, BUT NO FORMAL NOTICE PUBLISHED WITH SOS

PURPA Rulemaking – 2021.03.037

- January 26, 2021 - Docket initiated by Commission to begin informal comment period.
- March 17, 2021 - Solicited informal public comment.
- April 16, 2021 - Received comments from eight interested parties.
- No formal notice of proposed rulemaking has been published.
- Requested comments on the topics of
 - QF contract length
 - avoided carbon dioxide emission costs
 - Commission's Legally Enforceable Obligation (LEO) standard.
- At a subsequent business meeting, the Commission directed staff to solicit comment on appropriate avoided cost modeling methodology for hybrid (renewable + battery) qualifying facilities.
- **Need to schedule an informal roundtable discussion among Commission staff, utilities, QFs and other interested stakeholders to gather information on appropriate rule proposals for the modeling of hybrid facilities.**
 - Per Mont. Admin. R. 38.5.1910 a utility is required to provide a QF with an avoided cost calculation using the "methodologies most recently approved by the Commission for that utility . . ."
 - The Commission has not yet approved a methodology for modeling hybrid facilities.
 - FERC recently enacted new rules implementing PURPA that allow for Locational Marginal Pricing (LMP) which, if adopted by the Commission, would greatly simplify the calculation of avoided energy pricing.
 - The primary topic for consideration at any information meeting will likely be whether these rules should be adopted by the Commission.
- **Following discussion among stakeholders on hybrid modeling. Commission will publish proposed rules.**

Utility Long-Term Planning & Competitive Solicitation – 2021.01.007

- Required to implement 2019 HB 597.
- Seeks to implement changes in the law regarding the utility long-term planning process and competitive solicitations for electric resources.
- January 19, 2021 – solicited informal public comment.
- Comments received from 10 interested parties, including utilities, consumer groups, renewable/environmental groups, and the bill sponsor. Commenters were split on various elements of the proposal

- No formal Notice of Proposed Amendment yet published in Administrative Register.
- **Staff is preparing a draft analysis of the initial comments, and plans to request Commission approval in the next three weeks to issue a second proposed rulemaking and receive additional informal public comment.**

Montana Energy Impact Assistance Bonds – 2020.03.033

- Required to implement 2019 HB 467
- Will address HB 467's purpose of encouraging and facilitating the use of securitized, ratepayer-backed Montana Energy Impact Assistance bonds to address, and lower the costs associated with, the retirement and/or replacement of electric infrastructure.
- March 17, 2020 - Commission solicited informal public comment.
- May 8, 2020 - Received comment from NorthWestern Energy and Montana-Dakota Utilities.
 - Initial impression of comments by Commission staff was that commenters believed the bill to be unambiguous and that implementation could occur without rulemaking.
 - Recent audit flagged lack of rulemaking as inconsistent with legislative direction in the bill.
- No formal Notice of Proposed Rulemaking has yet been published in Administrative Register.
- **The Commission considered and approved a draft Notice of Proposed Rulemaking on September 21, 2021. The Notice will be sent to the Secretary of State for publication soon.**

PROPOSAL NOTICE PUBLISHED IN ADMINISTRATIVE REGISTER. NO FINAL RULE YET ADOPTED

Advanced Meter Infrastructure – 2019.12.108

- January 29, 2021 - Proposed Rule published in the Administrative Register.
- February 23, 2021 - Public hearing conducted.
- March 1, 2021 – Comment deadline. Commission received multiple comments, both written and orally during the hearing, from both utilities and customers.
- During rulemaking proceeding, in 2021 legislative session, legislature passed HB 606. HB 606 amends existing AMI statutory authority to redefine “Advanced Metering Devices” and add a definition for “Advanced Metering Gateway Devices”
 - Requires Commission to determine whether to establish rules for “opt-out” programs for customers.
 - Allows Commission to establish rules for an “opt-in” program.
 - Extends Commission’s deadline to adopt rules to July 1, 2022.
- **July 13, 2021 – Amended Notice and Extension of Comment Period on Proposed Action was published in order to accommodate changes to law contemplated by HB 606. Provides for an additional comment period.**
- **August 30, 2021 – Extended comment period closed.**

- **Deadline to adopt final opt-out rules is on or before January 13, 2022. Notice of adoption will be presented to the Commission for approval prior to publishing with Secretary of State.**
- **Commission has not yet initiated a docket on opt-in rulemaking, and has been given until July 1, 2022, to do so.**

Procedural Rules – 2021.04.053

- April 20, 2021 - Rulemaking initiated.
- May 14, 2021 - Proposed Rule Amendments published in Administrative Register.
- June 29, 2021 - Adoption of proposed rules approved by the Commission, as amended.
 - Removed changes to general and special intervention rules.
 - Made changes based on public comment.
- Amends various procedural rules to move toward electronic filing, streamline commission proceedings, eliminate duplicative or inconsistent procedural rules; and generally update certain outdated procedural rules.
- **The initial procedural rule update has now concluded, though there are a number of other procedural rules that should be amended/repealed/etc. for the sake of modernization and to line up more directly with existing Commission practice.**
- **Moving forward, the Commission will continue to review and amend its procedural rules within this docket as part of a larger-scale procedural rule overhaul.**

Implement 2021 HB 365 – Deregulates all Class B motor carriers – 2021.06.095

- HB 365 signed into law on May 14, 2021, effective July 1, 2021. Repeals Class B Motor Carrier Classification and Related Requirements.
- Commission authorized initiating of a repeal of Class B motor carrier rules on June 22, 2021.
- Proposed Rule sent to SOS for publication on August 3, 2021. Will be published in MAR on August 27, 2021.
- **Following hearing/receipt of comment, Commission may adopt final rules. Must be done on or before, February 27, 2022.**
- **Public hearing was held on September 21, 2021, and no comment was received.**
- **Written public comment due by September 24, 2021.**

Receivables/Tax IDs – 2021.04.053

- In its most recent legislative audit of the Commission, LAD noted several thousand dollars in very old/stale accounts receivable.
- These accounts are almost entirely owed by parties who have filed applications/petitions with the Commission, but refused/failed to submit filing fees therewith.
- Angie reported that the Commission has been unable to collect on these accounts for the following reasons:
 - Commission has no rule/statutory authority which allows it to reject a filing if appropriate fees are not paid.

- If fees remain unpaid, Commission has little, if any, recourse to seek payment.
 - Procedure recommended by LAD was to turn past-due accounts over to Department of Revenue.
 - DOR, however, will not take action on the accounts without a Federal Tax ID number.
 - Those same entities which have failed to pay filing fees, generally also refuse to provide a Tax ID number, and the Commission is without rules or statutory authority to require that information.
- **Notice of proposed rulemaking was certified to the Secretary of State for publication in the next edition of the Administrative Register.**
- **Public hearing scheduled for October 27, 2021, at 10:00 a.m.**

UPCOMING OR CONTEMPLATED RULEMAKINGS

- **Implement 2021 HB 576**
 - Repeals the renewable portfolio standard (Mont. Code Ann. §§ 69-3-2001 through - 2008).
 - **Will likely require, at a minimum, repeal of Mont. Admin. R. 38.5.8301 & .8302.**
 - **Staff will prepare a work session for the Commission to commence this rulemaking proceeding.**
- **Transportation Civil Citation Process**
 - Civil citation authority exists for pipeline safety violations (see e.g. Mont. Admin. R. 38.5.2203-.2209), however, while statutory authority exists for the transportation division, there are no rules to guide procedure.
 - Terminology would potentially need to be changed, but the general principles would remain the same as pipeline safety.
 - Receive complaint;
 - Conduct investigation;
 - Have work session to authorize issuance of order to show cause why Commission should not find violation(s) to have occurred;
 - Provide regulated party with opportunity to respond at Show Cause Hearing;
 - Issue Order and if appropriate reaching decision that violation(s) occurred, and assess fine;
 - Initiate enforcement proceeding in district court to collect fine.
 - **The Commission has not yet approved initiation of rulemaking on this, so it will need to be presented at a work session.**
- **Implement SB 183**
 - SB 183 revised the statute of limitation regarding overbilling of telecom services
 - Might not require rulemaking. Staff will assess further and advise the Commission on potential rulemaking.